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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1685

BERTHA ARBER and ANN ARBER BROEK,
Petitioners,

against

ESSEX WIRE CORPORATION and
WALTER F. PROBST,
Respondents.

BRIEF FOR DEFENDANT-RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW AND JURISDICTION

The opinions below and the bases asserted for this Court's jurisdiction are set forth in the petition and its appendices.

QUESTIONS PRESENTED FOR REVIEW

Petitioners have misstated the issues presented by the District Court and Court of Appeals decisions below. We therefore restate:

1. Whether the District Court and the Court of Appeals below committed clear error in holding that petitioners had failed to satisfy their burden of proof on each of the essential factual elements constituting a violation of Section 10(b) of the Securities Exchange Act of 1934.

2. Whether the Court of Appeals correctly decided that petitioners were precluded from raising for the first time on appeal the contention that they were improperly denied a jury trial. The Court of Appeals based its decision on two separate and distinct grounds:

(a) That petitioners' counsel waived any right to demand a jury by failing to object and, in fact, affirmatively consented to trial of all issues by the trial court sitting without a jury; and

(b) That, in any event, petitioners failed to raise issues of fact sufficient to require submission to a jury.

STATEMENT OF THE CASE

Since petitioners' statement of the case contains a number of significant omissions and misstatements of fact, we will briefly review the essential facts as expressly found by the District Court.

The Essex stock which was the subject of this action was originally owned by Herman Arber, an employee of Essex who had died in 1948. At the time of the 1961 sale which is the subject of this action, the stock was owned by petitioners Bertha Arber (Herman's wife) and Ann Broek (Herman's daughter). Ralph and Arthur Arber (Broek's brothers) also held contingent interests under a trust.* (A 18-19, 23.)

Although the sale took place in 1961, there had been a number of prior contacts between the Arbers and respondents Essex and Probst.** On one occasion, an Essex earnings statement was furnished to the Arbers at their request.

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* As used herein "A_____" refers to the page of petition Appendix A which contains the Findings of Fact and Conclusions of Law of the District Court; "B_____" refers to Appendix B to the petition which is the opinion of the Court of Appeals.

** Respondent Probst was President of Essex from 1959 until July, 1962. (A 18.)

(A 24.) At another time, attorneys representing petitioners and Mr. Probst communicated with one another concerning the possibility of the Arbers selling their stock. (A 19-20.) In 1959, petitioners met with Mr. Probst and discussed the possibility of selling the Arbers' stock to Essex. During the conversation, Mr. Probst showed petitioners Essex financial statements and gave his opinion that the company was doing well. (A 21.) At this time, petitioners were told that Essex would purchase their stock for $250.00 per share. Petitioners declined the offer.

In 1961, petitioners became desirous of financing a European trip. They were also discouraged by the rate of dividend return which their Essex stock was then yielding. (A 28-29.) Accordingly, petitioner Broek then telephoned Mr. Probst and asked if Essex was still interested in buying the stock. Later at a meeting Mr. Probst stated that Essex continued to do well and that the Arbers had been fortunate in waiting because the price at which Essex was offering to purchase stock had risen to $350.00 per share, an increase of 40% over the 1959 offer. (A 22-23.)

Subsequently petitioners met with Ralph Arber and a decision to sell was reached. Ralph Arber was very knowledgeable concerning the business operations of Essex, having been an employee of Essex and later having formed a company which was a direct competitor of Essex. Furthermore, Ralph Arber had considerable experience in security valuation. (A 23, 27-28.) Ralph Arber assured petitioners of the glowing prospects of Essex and counseled in favor of holding for long-term appreciation. Ralph expressly advised his mother and sister that:

> "Essex had excellent prospects for the future and, in advising Bertha Arber not to sell, told her that Essex was a 'helluva company' and a 'gung-ho outfit', that it was 'going to go a long way' because of its competent

> and aggressive management, and that if the stock ever went public it would be very valuable." (B 58.)

Petitioners however decided that immediate cash for their European trip and a higher investment return was more important than future prospects. (A 28-29.) Ralph Arber reluctantly accepted petitioners' decision and agreed to sign an assignment of his interest in the stock. Petitioner Broek contacted Probst and the sale was consummated. (A 23.)

At trial, petitioner Broek's testimony was to the effect that:

> "despite Ralph Arber's counsel against selling, Mrs. Broek and her mother *did not even consider* that the stock had increased from $250 to $350 in the space of a year and might further increase in price to $400 or even $1,000 per share (Tr., pp. 213-214). As Mrs. Broek put the matter: 'We were not far-sighted'..." (A 29; emphasis by District Court.)

Moreover, nowhere in her testimony did petitioner Broek even claim that she would have decided to retain the stock had she been aware of any facts which the complaint claims were concealed from her. Petitioner Broek acknowledged that she knew detailed financial information of Essex was available if she desired and had in fact been shown financial statements at her meeting with Probst less than two years earlier. (A 25-27, 47.) Broek was simply not interested in receiving any additional information. (B 58.)

The price received by the Arbers, which was at the time the highest price ever received by anybody for Essex stock, was found by the District Court to be fair and reasonable based on all information known as of the sale date. No significant or unusual information was contained in Essex books and records. During the period since petitioners were shown financials in 1959, the earnings per share had actually declined. (A 21, 33-42.) The stipulated evidence concerning contemporaneous stock sales disclosed that the Arbers obtained the same price received by other sellers of Essex

stock who unquestionably possessed all conceivable facts. Thus members of Essex' Board of Directors contemporaneously sold far greater amounts of stock than did the Arbers to both Essex and to various individuals at the same $350 per share price received by the Arbers. Among the sellers making contemporaneous sales at the same price received by petitioners were the Chairman of the Board, the Executive Vice President, the Treasurer, and independent outside director who headed a large Boston law firm, and even respondent Probst himself. All of the above information was based on a stipulated exhibit which was reproduced in the Court of Appeals opinion. (A 33-35; B 56-57.)

When the trial in this action commenced, only an equitable common law rescission claim was before the Court. A federal securities count had been stricken some 14 months earlier after an evidentiary hearing in which petitioners were unable to present factual support for their allegations of federal jurisdiction. The District Court held prior to the beginning of trial that petitioners were not entitled to a jury because all that remained was an equitable common law claim which did not entitle petitioners to a jury. Petitioners have never challenged the correctness of this ruling.

After the District Court began to receive evidence directed to the merits of the common law claim, petitioners' counsel came forward and in a surprise move announced that he had uncovered "newly discovered evidence" which disclosed that a theretofore unknown factual basis existed for federal jurisdiction. (Tr. 593-596.)* Despite the dubious character** of the proffered evidence, the Court granted

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* "Tr_____" refers to page of trial transcript.

** The Court permitted petitioners to call Ralph Arber to testify concerning certain interstate travel which he allegedly made in connection with negotiations for the sale of the Essex stock. This evidence was received at petitioners' request as "newly discovered" despite the fact that Ralph Arber had been sitting in the courtroom during the evidentiary hearing on the federal jurisdictional question which had been held over a year earlier. Ralph Arber did not testify at all at this earlier hearing. (Tr. 597-598.)

petitioners' motion for reconsideration of its earlier jurisdictional ruling and received the evidence.

It thereupon became obvious to both the Court and counsel that it would be fruitless and redundant to proceed solely with the bench trial of the common law rescission action unless the parties were prepared to submit both the federal and common law counts to the Court under a complete record. Only in this way would the Court be able to dispose of the case regardless of its jurisdictional ruling. Accordingly, the District Court expressly inquired as to whether petitioners' counsel would be prepared to submit to the Court not only the newly discovered evidence bearing on the question of federal jurisdiction but also any and all evidence which petitioners wished to offer on the merits of the federal count. Counsel for petitioners readily accepted the Court's suggestion and proceeded to present evidence on the federal count. (A portion of the colloquy between petitioners' counsel and the trial judge is reproduced in the Court of Appeals opinion, B 64-65.) The District Court subsequently concluded that federal jurisdiction had been established under Section 10(b) of the Securities Exchange Act but found petitioners' proof to be insufficient on all counts.

During trial and in their post-trial briefs, petitioners consistently urged the District Court to enter judgment for them on the merits on both the federal and common law counts. Counsel for petitioners never demanded a jury during trial; nor was the suggestion made either during trial or in post-trial briefs and proposed findings that the procedure employed by the Court was in any way objectionable. It was not until after the District Court ruled against petitioners and the case reached the Court of Appeals that petitioners first claimed that the District Court erred in not empaneling a jury when the federal claim was injected into

the case during trial. (B 65.) Therefore, the District Court was never asked to rule on the question of whether, if demanded, trial by jury is available under Section 10(b) of the Securities Exchange Act of 1934 when the only relief demanded is rescission or the monetary equivalent thereto.

The District Court found that petitioners' proof was insufficient on each of the essential elements of the federal and state claims including materiality, reliance and injury. In addition, the District Court held that rescission was unavailable because petitioners were guilty of laches.

The Court of Appeals affirmed the factual findings of the District Court as to petitioners' failure to prove the various elements of the federal and state claims. As to the petitioners' claim of being improperly denied a jury trial, the Court of Appeals found it unnecessary to rule upon the question of whether a right to a jury trial is available in Section 10(b) rescission cases, since two separate and independent grounds existed to support the judgment. First, the Court of Appeals found that petitioners' counsel had acquiesced and consented to a bench trial as to the federal claim and thus waived any jury right that may have existed. Second, after conducting an independent review of the record the Court of Appeals held that reasonable men could not differ on the proposition that defendants did not fail to disclose any material information and, as a consequence, the case should not have been submitted to a jury under any circumstances.

REASONS FOR DENYING THE PETITION

1. The Case Involves Only the Routine Application of Undisputed Legal Principles to an Unchallenged Set of Facts.

The questions presented for review concern only the routine application of undisputed rules of law to a particu-

lar set of facts. A review of the findings of fact by the District Court (none of which are specifically challenged) discloses that the decision is plainly correct. As to the issues which are presented, there are no conflicts among the Courts of Appeals and the case presents no important federal questions for review. Indeed, the petition does not attempt to suggest that such grounds exist. Rather petitioners merely reiterate the identical argument for the third time that the courts below should have found for petitioners based on assumed and unsupported contentions of fact and alleged incorrect procedural rulings.

Contrary to petitioners' sweeping assertions that the decision below "meant a victory for the doctrine of caveat emptor", the basic legal standard of materiality advocated by petitioners is precisely that which the Court of Appeals used. Thus, petitioners state on page 10 of their petition:

> "Petitioners contend that the proper rule was announced in *Affiliated Ute Citizens* v. *United States, supra*. 'All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision.' 406 U.S. 128, 153, 154."

However, this is exactly how the Court of Appeals articulated the test which it used (B 54-55):

> "We adhere to the test stated by the Second Circuit Court of Appeals in the landmark *Texas Gulf Sulphur* decision: whether a reasonable man would have attached importance to the undisclosed facts in determining his choice of action in the particular transaction in question."

Petitioners made absolutely no attempt to prove that there existed any nondisclosed fact which would have exercised an important influence on a decision by the Arbers or anyone else to buy or sell Essex stock. Instead, petitioners

took the position that the law requires express recitation to petitioners of all of the various financial facts contained in Essex' books and records regardless of their nature and regardless of whether the financial statements are known by the shareholders to be available upon request. It is obviously necessary for petitioners to take such an extreme position since it was undisputed that the Arbers had previously been shown financial statements, knew that all financial information was available upon request, and acknowledged that they would have acted no differently if they had been told about additional financial facts. Furthermore Ralph Arber who was unusually knowledgeable concerning Essex' business operations, gave petitioners the most optimistic predictions possible concerning the future value of Essex stock. Petitioners knowingly and intentionally rejected this long term growth potential in favor of immediate cash. Under these circumstances the District Court found that as a matter of fact and law no violation of Section 10(b) had occurred.

Petitioners make several curious references to the "floor characteristic" of Essex stock as constituting a claimed nondisclosed material fact. Petitioners apparently argue that the Arbers should have been told that the price of Essex stock was "guaranteed" to never decrease but would always increase. These assertions are nothing more than an afterthought never raised in the complaint, post-trial briefs or at any time before the District Court, and without any basis in fact. If petitioners now seek to imply that the Arbers were unaware that the sale price for Essex stock had been increasing over the years, the undisputed evidence is to the contrary. The Arbers knew full well that the sale price for Essex stock had steadily increased up until the Arber sale from $100 per share to $250 per share to $350 per share. (A 20-23.) If petitioners seek to imply that as of the Arber

sale date there was any guarantee or assurance that Essex stock value would never decrease, then this is a misstatement of fact directly contrary to express findings of the District Court. The trial court specifically found that there was no corporate plan or program reasonably certain to increase stock value. (A 29-36; B 59.) The trial court also concluded that substantial risk factors with regard to Essex' business and its stock value existed as of the Arber sale date. (A 37-39.) Under these circumstances, had Essex offered predictions or made representations or assurances to the Arbers that Essex stock would always increase in value, such prediction would have not only been factually unwarranted but may well have formed the basis for a potentially actionable misrepresentation in the event petitioners had acted in reliance thereupon.

To further illustrate the unrealistic position here advocated by petitioners, we note that petitioners make the flat assertion without any record support that the precise book value of Essex stock was somehow of great and independent significance. However, the Arbers acknowledged they were aware of the availability of financial statements setting forth book value and that that precise knowledge of the book value of Essex stock would have made no difference in their decision to buy or sell. Moreover petitioners' own expert testified under oath that Essex' book value was of no importance to him in appraising stock value. (Tr. 381.) In fact, in response to an inquiry by the Court, plaintiffs' expert, Dr. Stone, explained that investors and securities analysts alike attach little or no weight to book value in deciding whether to buy or sell stock. Thus in preparation for his expert testimony, Dr. Stone hadn't even bothered to compute Essex book value. (Tr. 378-379, 381.) Petitioners now ask this Court to ignore the factual findings of the trial court and rule that respondents were guilty of fraud because they did not specifically recite for petitioners' atten-

tion precise information concerning the book value of Essex stock even though petitioners knew the information was available but conceded that neither they nor investors generally would consider such information of any importance.

The fairness of the Arber price in 1961 is attested to by the fact that no one had ever received a higher price. The key evidence on this subject is collected in a very important exhibit which appears in the opinions of both the District Court and the Court of Appeals and was heavily relied upon by both Courts. (A 33-35; B 56-57.) This stipulated evidence disclosed that Essex officers and directors with knowledge of every conceivable fact concerning the company including the Chairman of the Board, the chief financial officer and even Probst himself, made contemporaneous sales of far larger amounts of their own personal stock to individuals and the company at the same $350 per share price. Petitioners have made no effort in any court at any stage of these proceedings to respond to this determinative exhibit.

Stripped to its essentials, this case presents a classic example of a shareholder who sold stock for immediate cash, ignoring knowledgeable advice to the contrary, and now wishes she hadn't. Assisted by the illumination of hindsight, petitioners are sure that there must be something that defendants could have told them which would have caused them to heed Ralph Arber's advice and hold the stock for future gain. Petitioners, however, are not able to state what that something might be. As regrettable as the Arbers' decision might have been from an investment standpoint, no Court has ever sought to provide the kind of investment insurance petitioners seek. Thus, the only question presented for review as to the petitioners' substantive contentions is whether the facts found by the District Court are sufficient to support the judgment. The judgment is manifestly correct under the facts. Petitioners seek only to have this

Court retry the same factual issues which have already been passed upon by two courts.

2. No Constitutional Questions are Presented Concerning The Right to Trial by Jury.

No Seventh Amendment questions are presented by this case regarding a party's right to trial by jury. Rather, the case involves only basic procedural rules. The record facts plainly disclose that petitioners' counsel consented to a non-jury trial of all claims and interposed his objection to the mode of trial only after the decision was rendered against petitioners. Thus, when the common law equity bench trial was altered at petitioners' request by the addition of a federal securities count during trial petitioners made no demand for a jury. In fact, as the Court of Appeals expressly noted, petitioners' counsel affirmatively stated that he did not object to submitting evidence regarding the federal claim to the Court and thereby permitting the Court to resolve all issues on a complete record. Nor did petitioners raise this issue in post-trial proposed findings and briefs submitted to the trial court prior to decision. Under these facts, the law is clear that petitioners have thereby waived any right to trial by jury and have consented to trial by the Court. As stated by Professor Moore:

> "now let us assume that the case is being tried to the court without a jury. If the new issue [which is then injected into the proceedings] is equitable there is no problem as to the method of trial for the issue is to be tried to the court. *If the new issue, although not raised by the pleadings, is legal, but is tried to the court by the express or implied consent of the parties and without any demand for jury trial having been made at the time the new issue was injected into the case, any right of jury trial has been waived and a party may not thereafter properly contend that he was denied his constitu-*

tional right of jury trial." (5 Moore's *Federal Practice* § 38.41, 329 (1971); emphasis added.)

To permit petitioners to retroactively revoke their consent to trial by the Court conflicts with the basic rule that a party is barred from raising on appeal issues which were not brought to the attention of the trial court.

Petitioners seek to nullify their consent to trial of the federal securities count by the District Court on the ground that they did not at that time know whether the trial court would find that jurisdiction existed. Manifestly, such a position is illogical and unfair. If counsel for petitioners actually entertained unstated objections to the mode of trial, then his actions in giving consent, presenting evidence and arguing the merits of the federal count would result in deliberately misleading the Court and respondents. Moreover, where jurisdiction is in doubt due to a disputed question of fact, jurisdictional and substantive issues are frequently determined simultaneously. *E.g., Cartrade, Inc.* v. *Ford Dealers Advertising Assn. of Southern Cal.*, 446 F.2d 289 (9th Cir. 1971). There is no right based on constitutional or other grounds which would require determination of all disputed issues of jurisdiction prior to the receipt of evidence relating to substantive claims thereunder. The undisputed and dispositive point is simply that the petitioners, after willingly submitting their federal securities claims for determination by the District Court, cannot now be heard to argue that their consent was wholly meaningless and inoperative.

There is a separate alternative ground upon which the decision of the Court of Appeals is based. After a thorough review of the record the Court of Appeals concluded that petitioners had made an insufficient factual showing to even permit the case to go to the jury. Therefore, petitioners'

objections concerning the mode of trial are in any event without merit.

Petitioners purport to present for this Court's consideration the interesting issue of the availability of the right to trial by jury in Section 10(b) cases when the only relief demanded is the equitable remedy of rescission or the exact monetary equivalent to equitable rescission. This case, however, is an inappropriate vehicle in which to confront that question since neither of the lower courts found it necessary to even consider the matter. The affirmative consent by petitioners to trial by the Court as well as the clear factual inadequacy of their case renders petitioners' attempt to argue such an issue before this Court both hypothetical and unnecessary.

CONCLUSION

Each of the essential issues of fact have been found adversely to petitioners by the District Court and the Court of Appeals. Petitioners have not and could not challenge before the Court of Appeals any specific findings as clearly erroneous under Rule 52 of the Federal Rules of Civil Procedure since such facts were abundantly established by the evidence. Therefore, in seeking further review, this Court is asked to accept a substitute version of the facts advanced by petitioners (without any supporting citations to the record) which two courts have already rejected in detailed and exhaustive opinions. Moreover, in asking this Court to award petitioners another chance to prove their case before a jury, petitioners simply ignore the undisputed and controlling fact that they never raised this objection before the trial court; the trial judge was never given an opportunity to rule on the point. Indeed, the trial transcript discloses that petitioners' counsel expressly consented to the procedure employed in that Court. Under these circumstances it is manifest that the case is without precedential significance

and that none of the criteria set forth in Rule 19 is applicable.

Accordingly, for the reasons set forth above, respondents herein respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

FRED H. BARTLIT, JR.
SAMUEL A. HAUBOLD
200 East Randolph Drive
Chicago, Illinois 60601

Attorneys for Respondents

Of Counsel:

H. STEPHEN MADSEN
BAKER, HOSTETLER & PATTERSON
1956 Union Commerce Building
Cleveland, Ohio 44115

KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601